ABU SAMAH HJ WAHAB

v.

BUKIT RAMBAI DEVELOPMENT & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: 22-67-1996]
18 JULY 2003

CIVIL PROCEDURE: *Solicitor - Change of solicitors - Appeal against dismissal of application to set aside notice of change of solicitors - Whether notice conformed with Form 138 Appendix A Rules of the High Court 1980 - Whether maxim qui facit per alium facit per se applicable - Whether change properly effected*

CIVIL PROCEDURE: *Stay of execution - Appeal against conditional stay of consent judgment - Stay granted pending disposal of suit to set aside judgment - Whether stay granted in accordance with s. 57(1) Courts of Judicature Act 1964 - Whether conditions imposed fair and reasonable*

There were two appeals before the court against the decisions of the registrar. The first appeal was against the registrar's dismissal of the fourth defendant's application to set aside the notice of change of solicitors filed by solicitors, Messrs HMS. The first appeal was also against the registrar's decision to stay execution of the consent judgment in this suit until the disposal of another suit filed by the fourth defendant to set aside the consent judgment. The second appeal was against the registrar's decision requiring the fourth defendant to deposit the judgment sum of RM1,137,525.36 in the interest bearing account of the plaintiff's solicitors and the fourth defendant's solicitors on or before 24 March 2003 and that both solicitors shall be the co-signatories to the said joint account.

Held:

[1] The notice of change of solicitors filed by Messrs HMS was in complete conformity with Form 138 in Appendix A Rules of the High Court 1980 ('RHC') as it has been duly filed in the registry of this court pursuant to O. 64 r. 1(2) RHC. Hence, it had validly and properly effected the change of solicitors from Skrine & Co to Messrs HMS. Further, there was no dispute to the notice of change of solicitors and the authority of Messrs HMS to act on behalf of the fourth defendant for a period of some

17 months from the date of filing of Form 138 to the dismissal of the fourth defendant's application. Also, the second defendant acted for all the defendants and more specifically for the fourth defendant in appointing Messrs HMS. That would attract the application of the maxim *qui facit per alium facit per se* (he who does an act through another is deemed in law to do it himself). Therefore, it followed that the notice of change of solicitors was in good order as it was effected by Messrs HMS for and on behalf of, *inter alia*, the fourth defendant. (pp 91 b-e & 92 f)

[2] The registrar had applied the same principle enunciated in *Tan Beng @ Tan York Soon v. Ji Kang Dimensi Sdn Bhd & Tegas Megah Sdn Bhd* in granting a conditional stay in line with s. 57(1) of the Courts of Judicature Act 1964. The conditions imposed were fair and reasonable. The registrar had supported his exercise of discretion by way of a well-considered judgment in which he had correctly applied the established principles in that case. (p 94 c-g)

[Appeals dismissed.]

Case(s) referred to:

Adnan Hj Mat Jidin & Anor v. Irwan Wee Abdullah & Anor [1997] 3 CLJ 181 CA ***(refd)***

Airmartech Corporation (M) Sdn Bhd v. Equaltra (M) Sdn Bhd [2003] 1 CLJ 191 HC ***(refd)***

Astro Exico SA v. Southland Enterprise [1982] 1 QB 1248 ***(refd)***

Daimler Company Ltd v. Continental Tyre and Rubber Company (Great Britain), Ltd [1916] 2 AC 307 ***(refd)***

Dan Sin Wah v. Chan Hai Swee [1951] 17 MLJ 189 ***(refd)***

Griffiths v. Evans [1953] 2 All ER 1364 ***(refd)***

In re Becket Purnell v. Paine [1918] 2 Ch 72 ***(refd)***

Jayasankaran v. PP [1983] 1 CLJ 171; [1983] CLJ (Rep) 182 FC ***(refd)***

Karthiyayani & Anor v. Lee Leong Sin & Anor [1975] 1 MLJ 119 FC ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***

Khaw Poh Chuan v. Ng Gaik Peng & Ors [1996] 2 CLJ 185 SC ***(refd)***

Leow Seng Huat v. Low Mui Yein [1996] 5 MLJ 381 ***(refd)***

Leong Poh Shee v. Ng Kat Chong [1996] 1 MLJ 86 ***(refd)***

Macaulay v. Polley [1897] 2 QB 122 ***(refd)***

Marsden v. Marsden [1972] 2 All ER 1162 ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

Neale v. Gordon Lennox [1902] AC 465 ***(refd)***

Ong Eng Chai v. China Insurance Co Ltd [1974] 1 MLJ 82 ***(refd)***

Pan Malayan Forwarding & Shipping Sdn Bhd v. Wing Tiek Holding Bhd (Shah Alam High Court No. 4-22-404-96) (Unreported) ***(refd)***
RHB Bank Bhd v. Pembinaan MCP Sdn Bhd [2003] 5 CLJ 335 HC ***(refd)***
Sarwari Ainuddin v. Abd Aziz Ainuddin [1999] 8 CLJ 534 HC ***(refd)***
Tan Beng v. Ji Kang Dimensi Sdn Bhd & Tegas Megah Sdn Bhd (Civil Suit No 22-277-1995; High Court Shah Alam) (Unreported) ***(foll)***
The Owners of the Ship or Vessel MT "Rowan" v. The Owners of the Ship or Vessel or Property "Singapura Timur" [2003] 2 CLJ 736 HC ***(refd)***
Waugh & Ors v. HB Clifford & Sons Ltd & Ors [1982] 1 All ER 1095 ***(refd)***
William Jacks & Co (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor [1991] 2 CLJ 1309; [1991] 1 CLJ (Rep) 492 SC ***(refd)***
Yonge v. Toynbee [1910] 1 KB 215 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 57(1), 73
Criminal Procedure Code, s. 307(iv)
Rules of the High Court 1980, O. 64 rr. 1(1), (2), (3), (4), 5, O. 70 r. 7(3)

For the plaintiff - Thara Singh Sidhu; M/s Thara Singh Sidhu
For the defendants - Shahul Hameed Amirudin; M/s Zul Rafique & Partners

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Appeals

One of the immensely important issues raised before the learned registrar and now before me in these two appeals included the filing of a notice of change of solicitors for a client in civil litigation.

These two appeals are in encls. (130) and (155) against the following decisions of the learned registrar:

1. On 29 November 2002, dismissing with costs the fourth defendant's application in encl. (124) which sought an order to set aside the notice of change of solicitors in encl. (92) filed by Messrs Hisham, Murthy, Sana & Associates ("solicitors HMS"), and also to stay execution of the consent judgment recorded on 27 February 2001 ("the consent judgment") in this suit, until the disposal of another civil suit filed by the fourth defendant in this court to set aside the consent judgment ("the first appeal"); and

2. On 24 February 2003, requiring the fourth defendant to deposit the judgment sum of RM1,137,525.36 in the interest-bearing account of the plaintiff's solicitors and the fourth defendant's solicitors on or before 24 March 2003, and that both the solicitors shall be the co-signatories to the said joint account ("second appeal").

Factual Background

The plaintiff's claim against the defendants is for a sum of RM2,623,102 for the defendant's alleged breach of an agreement.

The defendants have through the second defendant appointed Skrine & Co. to act for them, pursuant to which, the respective memorandum of appearance was filed for them.

Skrine & Co. subsequently discharged themselves as defendants' solicitors, as a result of which solicitors HMS were retained by all the defendants through the second defendant being the person in charge of all matters pertaining to this suit for all the defendants.

On 27 February 2001, solicitors HMS filed the notice of change of solicitors in place of Skrine & Co and on the same date in the presence of one Mr. K. Krishnamurthy learned counsel for all the defendants, and learned counsel for the plaintiff, the consent judgment was recorded before KN Segara J.

Plaintiff *vide* summons in chambers in encl. (108) obtained a judgment debtor summons and an order to cross-examine the fourth defendant in connection with the sum of RM19 million allegedly obtained from the Ministry of Defence (MINDEF) to satisfy the consent judgment.

In respect of the cross-examination of the fourth defendant, several postponements were sought and obtained, and was finally fixed for 31 July 2002.

On 29 July 2002, the fourth defendant *vide* another notice of change of solicitors appointed Zul Rafique & Partners ("solicitors ZRP") in place of solicitors HMS.

On 31 July 2002, solicitors ZRP applied for and obtained another postponement for the cross-examination of the fourth defendant, which was re-fixed for 4 September 2002.

On 2 September 2002, solicitors ZRP filed an application to set aside solicitors HMS' notice of change of solicitors and that application was amended on 4 September 2002.

The amended application was fixed for hearing on 8 November 2002 and dismissed with costs by the learned registrar on 29 November 2002.

Pursuant to the fourth defendant's application in encl. (138) for stay of execution of the consent judgment, the learned registrar made the above order on 24 February 2003.

Submission For Fourth Defendant

Encik Shahul Hameed Amirudin, assisted by Tuan Syed Shafiq Alhabshi, learned counsel for the fourth defendant, said that the second defendant invited his childhood friend, the fourth defendant to become a director of the first defendant a company registered under the Companies Act 1965 and that the fourth defendant was only aware of the consent judgment entered, allegedly without his authority when he received a letter from plaintiff's solicitors sometime in August 2001, as a result of which the fourth defendant contacted the second defendant who assured the fourth defendant that he (the second defendant) would take care of the civil proceedings in this suit.

Learned counsel added that in June 2002 the fourth defendant, not having received any response from the second defendant, appointed solicitors ZRP to act as his solicitors, who, through the searches and reconstruction of the cause papers, made the fourth defendant aware of the appointment of solicitors HMS as his solicitors, but the fourth defendant maintained that he had not at any time retained or authorised any one to retain solicitors HMS.

The crux of the contention for the fourth defendant is that the said Mr. K. Krishnamurthy has admitted by way of affidavit that the second defendant had given him instructions, *inter alia*, to file the notice of change of solicitors and to enter consent judgment on behalf of the fourth defendant and that the fourth defendant has neither seen nor given instructions to Mr. K. Krishnamurthy to enter the consent judgment on his behalf.

In asking for the consent order to be set aside, fourth defendant's learned counsel covered a broad spectrum of legal principles and relied on *Marsden v. Marsden* [1972] 2 All ER 1162; *Khaw Poh Chuan v. Ng Gaik Peng & Ors* [1996] 2 CLJ 185; *In re Becket Purnell v. Paine* [1918] 2 Ch 72; *Neale v. Gordon Lennox* [1902] AC 465; *Griffiths v. Evans* [1953] 2 All ER 1364; *Macaulay v. Polley* [1897] 2 QB 122; *Yonge v. Toynbee* [1910] 1 KB 215; *Daimler Company, Limited v. Continental Tyre and Rubber Company (Great Britain), Limited* [1916] 2 AC 307; and *William Jacks & Co (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor* [1991] 2 CLJ 1309; [1991] 1 CLJ (Rep) 492.

Contention For Plaintiff

En. Thara Singh Sidhu, learned counsel for the plaintiff, submitted that the second and fourth defendants, being the managing director and chairman respectively of the first defendant, represented the will and directing mind of the first defendant which entered into a joint venture agreement with the plaintiff and his parents as landowners in connection with a project from MINDEF to build houses for the army, for which they allegedly received RM19 million, in addition to RM1.47 million allegedly for transferring plaintiff's lands to the Federal Lands Commissioner.

He added that the second defendant had all along been delegated the authority to act for all the defendants, as was affirmed by the representative of Skrine & Co, which discharged themselves due, *inter alia*, to difficulties relating to solicitor's remuneration. The consent judgment expressly stated the said Mr. K. Krishnamurthy of solicitors HMS as the counsel for the defendants, on the basis of the notice of change of solicitors from Skrine & Co. to solicitors HMS on 27 February 2001.

To support the plaintiff's contention to set aside the consent judgment, reliance was placed on O. 42 r. 13; *Pan Malayan Forwarding & Shipping Sdn. Bhd. v. Wing Tiek Holding Berhad*, Shah Alam High Court No. 4-22-404-96 (Unreported)*; Leow Seng Huat v. Low Mui Yein* [1996] 5 MLJ 381; *Waugh and Others v. H B Clifford & Sons Ltd and Others* [1982] 1 All ER 1095; *RHB Bank Berhad v. Pembinaan MCP Sdn Bhd* [2003] 5 CLJ 335.

Decision On Appeal

Notice Of Change Of Solicitors

The procedural law regulating the change of solicitors is to be found in O. 64 r. 1(1), (2), (3) and (4) in the following words:

> **1 Notice of change of solicitor (O. 64 r. 1)**
>
> (1) A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, unless and until notice of the change is filed and served in accordance with this rule, the former solicitor shall, subject to rules 4 and 5, be considered the solicitor of the party until the final conclusion of the cause or matter, in the High Court.
>
> (2) Notice of a change of solicitor in Form 138 must be filed in the registry.
>
> (3) The party giving the notice must serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former solicitor a copy of the notice.

(4) The party giving the notice may perform the duties prescribed by this rule in person or by his new solicitor.

The Malaysian High Court Practice [1998] MLJ Desk Edn. p. 4388 explains that O. 64 deals with the various circumstances in which a change in the representation by a party, eg, the fourth defendant herein, may be made, and one such circumstance is where the solicitor of the party ceases to act for him, as in these appeals: see O. 64 r. 5.

Upon a proper perusal of the notice of change of solicitors filed by solicitors HMS, I have no doubt whatsoever that it is in complete conformity with Form 138 in Appendix A, as it has been duly filed in the registry of this court pursuant to O. 64 r. 1(2). Hence it has validly and properly effected the change of solicitors from Skrine & Co. to solicitors HMS.

For a period of some 17 months commencing from the date of filing of Form 138 on 27 February 2001 to the dismissal of the application in encl. (124) on 29 November 2002, there has been no dispute whatsoever as to the notice of change of solicitors and the authority of solicitors HMS to act on behalf of the fourth defendant.

Further, the fact that the second defendant has been acting for all the defendants and more specifically for the fourth defendant in appointing solicitors HMS as narrated above would in my view attract the application of the maxim *qui facit per alium facit per se* (he who does an act through another is deemed in law to do it himself).

Illustrations of the application of this maxim abound in the cases which came up for consideration and determination by our courts.

In *The owners of the ship or vessel MT "Rowan" v. The owners of the ship or vessel or property "Singapura Timur"* [2003] 2 CLJ 736, at 750 I held that "... When the court-appointed diver effected service of this writ, it was in practice done at the instance of the sheriff and so the act of effecting such service is to be attributed to the sheriff who is deemed in law to do it himself, under O. 70 r. 7(3) and r. 10."

In *Dan Sin Wah v. Chan Hai Swee* [1951] 17 MLJ 189, 193, Briggs J held that the execution of a document by a donee of a power of attorney granted pursuant to the Powers of Attorney Ordinance 1949 was an execution by the donor.

An insurance agent who was authorised to fill in and sign a proposal form was held to have done so on behalf of the policy holder, as the legal relationship of principal and agent was created in respect of the proposal form to effect the insurance in question: per Hashim Yeop A. Sani J (later CJ(M)) in *Ong Eng Choi v. China Insurance Co. Ltd.* [1974] 1 MLJ 82.

The maxim is an expression of the principle governing vicarious liability: per Raja Azlan Shah FJ (now HRH the Sultan of Perak) in *Karthiyayani & Anor. v. Lee Leong Sin & Anor.* [1975] 1 MLJ 119 FC. There a car owner was held liable because he had authorised or requested the act or because the driver was carrying out a task or duty delegated to him, or because he was in control of the driver's conduct. This Federal Court decision was followed by the Court of Appeal in *Adnan bin Hj Mat Jidin & Anor v. Irwan Wee bin Abdullah & Anor* [1997] 3 CLJ 181.

The Federal Court in *Jayasankaran v. Public Prosecutor* [1983] 1 CLJ 171; [1983] CLJ (Rep) 182 held that a petition of appeal filed and signed by the solicitor in respect of an appeal against conviction under s. 307(iv) of the Criminal Procedure Code was held to have complied with the relevant portion of s. 307(iv) which reads "the appellant shall lodge ... a petition of appeal ..." Although s. 307(iv) provides only for the appellant to file the petition of appeal and made no reference at all to the filing by the solicitor, the Federal Court held that the law does not provide for the appellant to do so "personally" or "in person".

Therefore, the solicitor filing and signing the petition of appeal would suffice as it attracts the maxim *qui facit per alium facit per se*.

I therefore agree with the decision of the learned registrar that the notice of change of solicitor is in good order, as it was effected by solicitors HMS for and on behalf of, *inter alia,* the fourth defendant.

Consent Judgment

None of the applications before the registrar and now none of the appeals before me contained any prayer for an order to set aside the consent judgment. I do not think I should express any view or write a judgment on this issue which would have to be ventilated in the other civil suit filed by the fourth defendant to set aside the consent judgment. Hence, apart from stating the authorities which the respective counsel have relied upon, I like to commend them for their endless efforts and energy in this regard.

Stay Of Execution Of Judgment

It is trite law that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the court of appeal so orders and no intermediate act or proceedings shall be invalidated except so far as the court of appeal may direct: s. 73 CJA 1964.

Special circumstances may however exist to enable the court to exercise the discretion to grant a stay of execution of a judgment.

Raja Azlan Shah J (now HRH the Sultan of Perak) explained in *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86 that:

> Special circumstances, ..., must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common ...

(see also *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380).

In *Airmartech Corporation (M) Sdn. Bhd. v. Equaltra (M) Sdn. Bhd.* [2003] 1 CLJ 191 at p. 201 I have the occasion to state:

> In my view, there is no rigid formulation as to what constitutes or does not constitute "special circumstances". The legislature has wisely refrained from providing for a rigid formulation or definition as such special circumstances may only be determined by way of illustrations unfolded by the matrix of facts and circumstances prevailing in any particular case which must be deposed to in specific details in an affidavit. I hasten to add that the permutations, combinations or categories of such circumstances are never closed.

Edgar Joseph Jr FCJ (as he then was) in *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 elucidated at pp. 706-707 as follows:

> ... I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised.

In this context the fact that the stay would result in the fruits of the judgment being rendered nugatory is one of the factors to be considered (see *Sarwari a/p Ainuddin v. Abd Aziz a/l Ainuddin* [1999] 8 CLJ 534).

In granting a stay of execution of judgment, the court may have regard to s. 57(1) of the CJA 1964 which where relevant provides as follows:

> Except in the cases mentioned subsection (3) and section 56A, no appeal shall operate as a stay of execution, but the High Court or the Court of Appeal may stay execution on any judgment, order ... pending appeal on such terms as to security for the payment of any money or the performance or non-performance of any act ... in the judgment, order ... as the Court may seem reasonable.

In *Tan Beng @ Tan York Soon v. Ji Rang Dimensi Sdn Bhd & Tegas Megah Sdn Bhd* (Civil Suit No 22-277-1995; High Court Shah Alam) (unreported), I applied s. 57(1) in granting a conditional stay in the following terms:

> There shall be an order to stay the execution of the rest of the judgment sum ie, less the aforesaid sum of RM3,344,129.03 together with all interest accrued. Pursuant to s. 57(1) of the Courts of Judicature Act 1964, the stay is subject to the condition that the rest of the judgment sum shall be deposited on or before 7.3.2002 in the interest-bearing solicitors' joint account of which the solicitors for both the plaintiff and the defendant shall be the authorised joint signatories, being the security for the payment of the rest of the judgment sum and not to be released save and except pursuant to an order of this court, the Court of Appeal or the Federal Court, as the case may be.

(see also *Astro Exico S.A. v. Southland Enterprise* [1982] 1 QB 1248.)

The learned registrar has applied the same principle here in granting a conditional stay obviously in line with s. 57(1) of the CJA 1964 in imposing conditions which I hold as fair and reasonable.

The learned registrar has supported his exercise of discretion by way of a well-considered judgment in which he has correctly applied the established principles as alluded to above.

Hence, save and except for the judgment sum in *Tan Beng, supra,* which is now substituted with the judgment sum entered in the consent judgment, the other conditions are applied and adopted herein.

Conclusion

The learned registrar's decisions are free from errors and are hereby affirmed, with the inevitable result that the two appeals herein are dismissed with costs.